No. 10,359

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FLOTATION SYSTEMS, INC. (a corporation), and UNITED STATES FIDELITY AND GUARANTY COMPANY (a corporation),

Appellants,

vs.

UNITED STATES for use of ANDREW POLLIA, T. G. SHANNON and B. W. MACKIE, co-partners doing business under the fictitious name and style of Shanmac Co.,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

Codes

Texts

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BRIEF FOR APPELLEES.

STATEMENT OF QUESTIONS PRESENTED.

1. Did the trial Court erroneously interpret the contract?

2. Is the evidence sufficient to support the findings and judgment?

STATEMENT OF FACTS.

On the 22nd day of January, 1940, Flotation Systems, Inc., a corporation, was awarded a contract by

the United States of America for the installation of a gasoline storage and distribution system at the Naval Air Station located in the City of Alameda, County of Alameda, State of California (R. 3).

The Flotation Systems, Inc., a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, as surety, executed and delivered to the Navy Department of the United States of America a certain security bond in the penal sum of one hundred seventy-five thousand dollars ($175,000.00), guaranteeing the faithful performance by the Flotation Systems, Inc., a corporation, of said contract in the payment of all claims of laborers and material men and sub-contractors (R. 3).

In May, 1940, one Andrew Pollia was at the site engaged in the performance of some work in no way connected with this litigation (R. 49).

Eugene Ceriat, superintendent of construction for Flotation Systems, Inc., a corporation (R. 49-62-111), approached Pollia to ascertain whether or not Pollia would be interested in submitting a bid for installing pipe lines relative to gasoline storage system (R. 49-50). Pollia submitted a bid—letter of May 27, 1940, Plaintiff's Exhibit 1 for identification (R. 50), which bid was not acceptable (R. 51); after some discussion between Messrs. Ceriat, Pollia and Snyder (R. 50-51-81-82) the latter carried on the company's payroll and record as an engineer (R. 131) but acting as a general clerk (R. 51-131) revised Pollia's proposal (R. 132) thereafter drew up (R. 167-168) and typed (R. 81-131) a contract on Pollia's stationery (R. 51).

On the 28th day of May, 1940, under the circumstances set forth in the preceding paragraph, said document was signed by Pollia and submitted to Ceriat "who read it carefully * * * did not go into details * * * satisfactory to me" (R. 112) and the same was "Accepted by Eugene Ceriat, Date 5-28-40" (R. 52).

Thereafter said contract, Plaintiff's Exhibit 2 in evidence, was forwarded to the main affice of Flotation Systems, Inc., a corporation, at Los Angeles, where it was received, checked, or at least read (R. 223-244-245) by Fred E. Kalte, Vice President (R. 222) of Flotation Systems, Inc., a corporation, and then passed same to James Q. Henry (R. 224), President (R. 224) of Flotation Systems, Inc., a corporation, who, in ink and by longhand, made the following notation "O. K. James Q. Henry" and then said document filed (R. 224).

Pollia actively undertook the performance of said contract prior to the time said document was actually okayed by James Q. Henry (R. 53).

On the 1st day of August, 1940, Pollia, pursuant to request, arranged for and obtained an itemization (R. 64) totaling Four Thousand Seven Hundred Thirty-seven Dollars and forty-nine cents ($4,737.49) (R. 73) to be used as a basis of partial payment, during which and for the first time an issue as to interpretation of the contract was raised by Mr. Snyder (R. 66-72-81-162-193-225-236).

Pollia thereafter proceeded to Flotation's Los Angeles office where further discussion was had on

the subject (R. 65). Norwithstanding the aforementioned conversations, Flotation issued, on account, a check to Pollia in the sum of One Thousand Dollars ($1000.00) with the advice balance would be paid next day (R. 69-89)—"next trip to Alameda in a week or so" (R. 68-73).

Pollia then returned to San Francisco and job site (R. 68).

Several days later Pollia was informed by Flotation's Mr. Taylor that "he had taken the matter up with their attorney * * * was included in the contract and that they were not going to pay it * * *", (R. 69) and that irrespective of any discussions at Alameda, Los Angeles, partial payment and continuation of his sub-contract, that payment would not be made "because he (Taylor) understood the contract to mean" * * * "he believed, or had been informed, that his contract provided that you (Pollia) should do all the work in the pits" (R. 90-91).

Pollia completed sub-contract according to plans and specifications (R. 62-72) and has not been paid (R. 72) the balance due and owing being the sum of Nine Thousand Seven Hundred Twenty-seven Dollars and twenty-one cents ($9,727.21) (R. 76).

Flotation's point as to interpretation involves the use of the words "to pit boxes".

ARGUMENT.

I.

DID THE TRIAL COURT ERRONEOUSLY INTERPRET THE CONTRACT?

Litigants are not excepted from the statutes which provide.

> "A contract is an agreement to do or not to do a certain thing."
>
> *Civil Code of the State of California,* Sec. 1549.

> "Express contract is one, the terms of which are stated in words."
>
> *Civil Code of the State of California,* Sec. 1620.

> "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."
>
> *Civil Code of the State of California,* Sec. 1625.

The record discloses that in plaintiffs' exhibit in evidence No. 2, items 1, 2, 3 and 4, that the phrase "to the pits" is used.

Appellants contend that Appellee under the contract required to perform work "in the pits", although the contract is lacking the use of any such words as "addition", "also", "in", "inside", "including", or even words of similar import.

In this connection it is to be noted that defendants saw to it: That the word "addition" was used in Plaintiff's Exhibit in Evidence No. 9, and "additional" in Plaintiff's Exhibit in Evidence No. 10.

It is also to be specifically noted that in Appellants' opening brief, page 8, that goodly use is made of the word "including".

It is most difficult to appreciate that while Appellants made use of the words "addition", "additional", and now make use of the word "including" upon some occasions, yet did not so do in Plaintiff's Exhibit in Evidence No. 2, why it is urged and/or expected that "proper construction" requires the incorporation and reading of the above quoted words into the contract of May 28, 1940 in order to obtain "the proper construction".

In order to ascertain whether or not the Court erroneously interpreted the contract, consideration must be given as to what the word "to" means:

> "to—primarily to express the relation of direction of approach and arrival, making its governed word denote the terminus * * * approach and reaching so as to attain or reach as a limit".
>
> *Webster's New International Dictionary*—Second Ed. Unabridged.

As to what sense (interpretation) the word "to" is used

> "The language of a contract is to govern its interpretation if the language is clear and implicit and does not involve an absurdity."
>
> *Civil Code of the State of California,* Sec. 1638.

> "The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning unless used by the parties in a technical sense or unless a

special meaning is given to them by usage, in which case the latter must be followed."

Civil Code of the State of California, Sec. 1644.

"Words are to be understood in their plain and literal meaning."

Clark on Contracts, 3rd Edition 502, Par. 219.

"Further, a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language but will enforce the contract according to its terms.

A contract is not ambiguous where the court can determine its meaning without any other guide than a knowledge of the simple facts on which from the nature of language in general, its meaning depends."

13 *Corpus Juris* 520, Par. 481.

"The intention of the parties is to be deduced from the language employed by them and the terms of the contract where unambiguous are conclusive in the absence of averment and proof of mistake. The question being not what intention existed in the minds of the parties but what intention is expressed by the language used. When a written contract is clear and unequivocal, its meaning must be determined by its contents alone and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.

It is not the province of the court to alter a contract by construction or to make a new contract for the parties. Its duty is confined to the interpretation of the one which they have made for themselves without regard to its wisdom or folly as the court cannot supply material stipulations or read into the contract words which it does not contain."

13 *Corpus Juris* 524, Par. 485 (3).

"in construing a written contract the words employed will be given their ordinary and popularly accepted meaning in the absence of anything to show that they were used in a different sense."

13 *Corpus Juris* 531, Par. 489.

Hurried consideration establishes that the word "to" is one most frequently used in the English language. Few people would seriously contend that the word "to" is analogous, means, or is synonymous with the words "addition", "also", "in", "inside", "including".

Even Mr. Kalte finally conceded

"Q. Isn't it true that in looking over the agreement, it was your opinion at that time that Mr. Pollia did not have to do the work in the pits—I am talking about the morning in Los Angeles?

A. I would say that according to the way I read the agreement, it could be interpreted that way, but personally I did not think it was."

R-234.

Now Appellants urge that the trial Court erroneously interpreted the contract the very moment the

Judge failed to construe the word "to" so as to not coincide with Mr. Kalte's personal idea on the subject.

Notwithstanding such admission, appellants want this Court to do two things: First, to rule that the trial Judge erroneously interpreted the contract, and second, in effect re-write the contract.

II.

IS THE EVIDENCE SUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT?

The pertinent sections applicable to this appeal are:

> "Issues of fact in civil cases in any District Court may be tried and determined by the Court without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The findings of the Court upon the facts which may be either general or special shall have the same effect as the verdict of a jury."
>
> *U. S. Code Annotated,* Title 28, Sec. 773,

and

> "when an issue of fact in any civil cause in a District Court is tried and determined by the Court without the intervention of a jury according to Sec. 773 of this title, the rulings of the Court in the progress of the trial of the cause, as excepted to at the time and duly presented by a Bill of Exceptions, may be reviewed upon a writ of error or upon appeal, and when the find-

ing is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

U. S. Code Annotated, Title 28, Sec. 875.

Under the two questions presented, interpretation and sufficiency of the evidence, Appellants are required to convince or demonstrate, if their appeal is to be successful, that the record discloses neither conflict nor contradiction. That Appellants' theory is untenable may be readily ascertained by reference to Appellee's statement of facts. The case is therefore brought well within the rule that

"Conflicts or contradictions in the evidence are subjects for consideration by the trial Court and its findings will not be set aside because thereof."

Pabst Brewing Co. v. E. Clemens Horst Co. (C.C.A. Cal. 1920), 264 F. 909.

"Findings of Court based on conflict of evidence are conclusive on appeal."

Galle v. Hamburg (N. Y. 1916), 233 F. 424, 147 C.C.A. 360.

"In an action at law tried by the Court without a jury, where special findings are not made, the general finding is conclusive on the facts, and an Appellate Court cannot review the evidence by only rulings made during the progress of the trial duly excepted to and presented by Bill of Exceptions in view of this section."

S. P. Co. v. Kalbaugh (C.C.A. Cal. 1927), 18 F. (2d) 837.

"When the findings in the trial Court involves mixed questions of law and fact and is general in its form, nothing is open to review in the Circuit Court of Appeals except the ruling made in the progress of the trial, the findings being conclusive as to the facts."

Humphreys v. 3rd National Bank (Ohio 1896), 75 F. 852, 21 C.C.A. 538 affirming C.C. 1895.

"When a common law action is tried to the Court, its findings of fact are conclusive on appeal, and if the facts found are sufficient in law to support the judgment, it must stand unless the Court erred in admitting or reviewing evidence over the objection of the complaining party."

Eli Mining and Land Co. v. Carleton (Colo. 1901), 108 F. 24, 47 C.C.A. 166.

"In an action tried to the Court, findings of fact are conclusive in the Appellate Court, though it might have reached a different conclusion on the evidence."

National Surety Co. v. Globe Grain and Milling Co. (C.C.A. Cal. 1919), 256 F. 601.

"Where an action at law is by stipulation tried to the court under the provisions of this section and Sec. 773 of this title, the findings of fact by the court are not reviewable by Appellate Court if there is any competent evidence on which that could have been made."

Chautauqua Institution v. Zimmerman (Ohio 1916), 233 F. 371, 147 C.C.A. 307;

Ill. Surety Co. v. U. S. (N. Y. 196), 229 F. 527.

"The court's findings upon question of fact, a jury having been waived, are not subject to review by a reviewing court if there was any evidence upon which such findings could be made."

Kissel Motor Car Co. v. Walker (C.C.A. Tex. 1921), 270 F. 492.

"An assignment that the court erred in making a particular finding of fact is not reviewable on appeal if there is any evidence on which to base the finding."

San Fernando Copper Mining Co. v. Humphreys (Cal. 1904), 130 F. 298.

"Findings of lower court on the evidence will not be disturbed unless they are manifestly wrong."

Boteler v. Plugge (App. D. C. 1927), 17 F. (2d) 221.

"Findings supported by any evidence should not be disturbed where jury is waived."

Boack v. Robie (C.C.A. Ill. 1926), 16 F. (2d) 33.

"Finding which is not shown to be clearly wrong will not be disturbed on appeal."

J. Ochoa and Hermano v. Perez Blanco (C.C.A. Porto Rico 1926), 15 F. (2d) 618.

"A finding by the trial court will not be disturbed by the court on appeal when there is any

evidence to support it or the evidence tends to support it."

Dooley v. Pease (Ill. 1901), 21 S. Ct. 329, 180 U. S. 126.

"In a case tried by the court without a jury under this section and Sec. 773 of this title, the Supreme Court on a writ of error (or appeal) cannot pass on the weight and sufficiency of the evidence."

Dirst v. Morris (Ill. 1872), 14 Wall. 484.

"Findings of fact on the weight of the evidence are not reviewable."

Hathaway v. First Nat'l. Bank (Mass. 1890), 10 S. Ct. 608, 610, 134 U. S. 494.

"Errors alleged in the findings of the court on a trial without a jury are not subject to revision by the Circuit Court of Appeals, that Court being limited in that connection to the question whether there is any evidence upon which such findings could be made."

Paul v. Delaware Co. (C.C. N. Y. 1904), 130 F. 951;

Supreme Lodge Knights of Pythias v. England (Ark. 1899), 94 F. 369, 36 C.C.A. 298.

Appellee submits that under the record and the law that the judgment be affirmed.

Dated, San Francisco,
May 12, 1943.

J. J. Doyle,
Attorney for Appellee.

STIPULATION OF COUNSEL.

It is hereby stipulated that this brief may be also considered the brief of T. G. Shannon and B. W. Mackie, co-partners, doing business under the fictitious name and style of Shanmac Co.

Dated, San Francisco,
May 12, 1943.

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